83-1213

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

COMMONWEALTH OF KENTUCKY - **Petitioner**

versus

VONDLE LEE HAMILTON - - - **Respondent**

Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR PETITIONER, WITH APPENDIX

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Petitioner, Commonwealth of Kentucky, respectfully prays that a Writ of Certiorari issue to review the Opinion of the Supreme Court of Kentucky rendered August 31, 1983 only to the extent that said Opinion reversed and remanded the judgment finding respondent guilty of incest. A petition for rehearing filed by petitioner was denied by the Supreme Court of Kentucky in an order entered November 23, 1983.

I.

THE QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Kentucky misapplied the holding in *Blockburger* v. *United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), when it ruled that the respondent's convictions of rape and incest which arose from a single act of sexual intercourse with his then ten (10) year old daughter constituted a violation of the respondent's constitutional guarantee against double jeopardy?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed. In addition it should be pointed out that Pauline Hamilton, the wife of the respondent herein, was jointly tried with respondent for rape and incest and found guilty. Her appeal was briefed separately, however, and her sentence on both the rape and incest charges was reversed in a separate opinion also entered by the Supreme Court of Kentucky on August 31, 1983.

TABLE OF CONTENTS

	PAGE
The Question Presented for Review	i
List of Parties to the Proceeding	i
Table of Contents	ii
Table of Authorities	iii
Reference to Opinions	1
Statement of Jurisdiction	1- 2
Constitutional and Statutory Provisions Involved	2- 3
Statement of the Case	3- 7
Arguments and Reasons for Granting the Writ of Certiorari	7-17
Conclusion	17
Proof of Service	18
Appendix	1a-15a

TABLE OF AUTHORITIES

Cases:

PAGE

Albernaz v. United States, 450 U. S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) 15
Blockburger v. United States, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) 6, 7–8, 14
Breeding v. Commonwealth, 191 Ky. 128, 229 S. W. 372 (1921) 12
Brown v. Ohio, 432 U. S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) 9
Burdue v. Commonwealth, 144 Ky. 428, 138 S. W. 296 (1911) 12
Hamilton v. Commonwealth, Ky., 659 S. W. 2d 201 (1983) 7, 8, 12, 13, 14, 16
Harris v. Oklahoma, 433 U. S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977) 16
Missouri v. Hunter, 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983) 15
State ex rel. Lawrence v. Burke, 253 Wisc. 240, 33 N. W. 2d 242 (1948) 14
State v. Martin, Tenn. Cr. App., 634 S. W. 2d 639 (1982) 13
Whalen v. United States, 445 U. S. 684, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980) 11

Constitutional Provisions:

Fifth Amendment, Constitution of the United States 2
Fourteenth Amendment, Constitution of the United States 2

Statutes and Rules:

28 U.S.C. 1257(3) 2
Rule 17.1(b) and (c) of the United States Supreme Court 2
Kentucky Revised Statutes (hereinafter "KRS"), 510.040 .....2, 9, 15, 14a
KRS 530.020 .....2, 10, 16, 14a
KRS 505.020 .....2, 11, 12, 14a-15a

Other:

Roberson, *Kentucky Criminal Law and Procedure*, 2d Ed., Sec. 139 (1927) 11, 12

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

VONDLE LEE HAMILTON - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER, WITH APPENDIX

REFERENCE TO OPINIONS

The Opinion of the Supreme Court of Kentucky, File No. 82-SC-671-MR, affirming the respondent's conviction for rape and reversing the respondent's conviction for incest was rendered on August 31, 1983 and is published at *Hamilton* v. *Commonwealth*, Ky., 659 S. W. 2d 201 (1983). This Opinion may be found at Appendix 1a-10a. The Order denying the petitioner's petition for rehearing was entered on November 23, 1983 and may be found at Appendix 11a.

STATEMENT OF JURISDICTION

The Opinion of the Supreme Court of Kentucky was rendered in a published opinion on August 31,

1983. Rehearing was denied in an order entered November 23, 1983.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate opinion in question by 28 U.S.C. Section 1257(3). This Court should grant the writ of certiorari under the authority of Rules 17.1(b) and (c) of this Court.

Rule 17.1(b). The Supreme Court of Kentucky, in ruling that the Double Jeopardy Clause of the United States Constitution prohibits the respondent's conviction of both rape and incest resulting from a single act of sexual intercourse, has decided a federal question in a way in conflict with a decision of another State Court.

Rule 17.1(c). The Supreme Court of Kentucky has misapplied the holding in this Court's Opinion of *Blockburger* v. *United States,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that there is no constitutional authority to justify the result of the Supreme Court of Kentucky in reversing the incest conviction and in remanding the case to the lower court with directions to set aside the incest conviction. Such absence of authority involves reference to:

The Fifth Amendment, Constitution of the United States

The Fourteenth Amendment, Constitution of the United States

Kentucky Revised Statutes 510.040, 530.020, 505.020

The full text of this authority is set forth at Appendix, pp. 12a-15a.

STATEMENT OF THE CASE

References herein will be to the transcript of evidence of the original trial, hereinafter referred to as "TE", as well as to the transcript of record, hereinafter referred to as "TR". These transcripts are not presently before this Court. Reference will also be made to the Opinion of the Supreme Court of Kentucky Affirming in Part and Reversing in Part and Remanding rendered on August 31, 1983 and to the Order denying the petition for rehearing rendered on November 23, 1983. These documents can be found in the Appendix, pp. 1a-11a.

On September 15, 1981, the Pike Circuit Court Grand Jury returned Indictment No. 81-CR-132 against Vondle Lee Hamilton and his wife Pauline Hamilton [codefendant] (TR 4-5). Both defendants were charged with the crimes of first degree rape and of incest of their daughter Sue Ann Hamilton at some unspecified date in 1981 (TR 4). The third count of the indictment charged respondent alone with being a persistent felony offender in the second degree.

Glenda Sue Thacker, the respondent's sister, testified that Pauline Hamilton told her that the respondent had gotten drunk and admitted to her that he had sex with Sue Ann. (TE 24). Mrs. Thacker also stressed that Sue Ann was eleven (11) years old at the time of trial but was only ten (10) years old at the time this

was taking place. (TE 25). Draxie Keene, the respondent's mother, as well as Roy Hamilton confirmed that Pauline Hamilton said that the respondent had sex with Sue Ann and made her watch. (TE 188, 203).

Sue Ann Hamilton was found competent to testify. At trial Sue Ann Hamilton admitted that sometime last year her father did something to her that she felt he should not have done (TE 93). She testified that it happened at home and that her brothers, Rocky, Scottie, Randy, and Billy were present (TE 93). Sue Ann acknowledged that her father put a part of his body into her between her legs (TE 94). The act occurred in the respondent's bedroom (TE 95). Sue Ann also knew that the part of the anatomy that the petitioner, the Commonwealth, was referring to was part of a man's body between his legs (TF 96). Sue Ann denied that anyone else had done this act to her (TE 96). Sue Ann did admit that her dad, her brothers, and her uncles have all felt her between her legs (TE 96). Her father however was the only person that put part of his body in her (TE 97). Sue Ann also acknowledged that her mother (Pauline Hamilton) told her not to tell on the respondent and to tell that it did not happen (TE 98).

On cross-examination by the respondent's attorney, Sue Ann again acknowledged that the respondent put that part of his body between his legs in her (TE 103). Sue Ann testified that the respondent told her to remove her clothes while she was in his bedroom (TE 104). Sue Ann also noted that the respondent explained to her that if she did certain things she could

have a baby by showing her what he looked like naked and what she looked like naked (TE 105).

Dr. David K. Mulliken testified that Sue Ann had a vaginal opening consistent with sexual intercourse and that it was his opinion that she had sexual intercourse over some period of time prior to the examination (TE 120).

The respondent testified and denied having sex with Sue Ann (TE 268). The respondent admitted, however, showing Sue Ann his parts and attempted to tell her that she could get herself in trouble by becoming pregnant (TE 270-271). The respondent on direct examination by Pauline Hamilton's attorney acknowledged that he asked Pauline to bring Sue Ann into his bedroom (TE 280). On cross-examination by the petitioner, the respondent acknowledged that he asked Sue Ann to strip off her clothes when she came into his bedroom (TE 292). The respondent also acknowledged that he heard that Donnie West, a retarded boy, had overheard the respondent in the bedroom with Sue Ann (TE 293).

The respondent's motion for a directed verdict and motion for setting aside the jury were overruled by the trial court. Objections to instruction number one and instruction number three on the ground that incest merged into the greater offense also were overruled (TE 328).

After instructions were given, the jury deliberated and found Pauline Hamilton and the respondent guilty of first degree rape and fixed their punishment at life in the penitentiary. The jury also found Pauline Ham-

ilton and the respondent guilty of incest and fixed their punishment at ten years in the penitentiary. The PFO charge as to the respondent was thereupon dismissed since such a conviction would not enhance his sentence (TE 377).

In an appellate brief filed January 26, 1983 in the Supreme Court of Kentucky, respondent contended in his third issue that the trial court erred and violated his constitutional guarantee against double jeopardy as well as his right to be free from multiple prosecution by permitting him to be convicted of incest as well as first degree rape.

In a published opinion rendered August 31, 1983, the Supreme Court of Kentucky affirmed the judgment finding the respondent guilty of the rape and reversed that part of the judgment finding the respondent guilty of incest.

In so reversing the incest conviction, the Supreme Court of Kentucky in its majority opinion noted the following as is applicable to this petition:

> However, the *Blockburger* [*Blockburger* v. *United States,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)], test is not to be applied in the abstract, so that we merely look at the statute standing alone. The test must be applied subjectively. When we view the present case, we find that the proof utilized to convict the appellant [respondent] of rape was that he had sexual intercourse with a ten year old child, who was, in actuality, his daughter. The only additional fact — the relationship of father/daughter — was required in the incest charge. Thus, in a sense, the additional fact

was not present in 'each' case, as required by *Blockburger,* but in only one case. (Appendix at 3a).

A petition for rehearing was filed by the Commonwealth on September 20, 1983. In an order dated November 23, 1983, the Supreme Court of Kentucky denied the petitioner's petition for rehearing. (Appendix at 11a).

ARGUMENTS AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

By Holding That the Respondent's Convictions of Rape and Incest Constituted a Violation of the Respondent's Constitutional Guarantee Against Double Jeopardy, the Supreme Court of Kentucky Has Misapplied the Facts of This Case to the Law Under the Controlling Decision of *Blockburger* v. *United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

In an opinion rendered August 31, 1983, styled *Vondle Lee Hamilton* v. *Commonwealth of Kentucky* (No. 82-SC-671-MR), *To Be Published,* Ky., 659 S. W. 2d 201 (1983), the Supreme Court of Kentucky ruled that it violated the constitutional prohibition against double jeopardy to impose sentences of both rape and incest on the respondent from a single act of sexual intercourse committed by the respondent on his ten (10) year old daughter. *Hamilton* v. *Commonwealth, supra* (see Appendix at 2a).

In applying the test as expressed in *Blockburger* v. *United States,* 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the Supreme Court of Kentucky in its majority opinion made the following observation:

> However, the *Blockburger* test is not applied in the abstract, so that we merely look at the statute standing alone. The test must be applied subjectively. When we view the present case, we find that the proof utilized to convict the appellant of rape was that he had sexual intercourse with a ten year old child who was, in actuality, his daughter. The only additional fact — the relationship of father/daughter — was required in the incest charge. Thus, in a sense, the additional fact was not present in 'each' case, as required by *Blockburger,* but in only one case.
>
> *Hamilton* v. *Commonwealth, supra.* (See Appendix at 3a).

The petitioner respectfully submits that the majority opinion has misapplied the *Blockburger* test to the facts in the case at bar. Furthermore the petitioner submits that the Kentucky legislature has prohibited two different crimes and that the policy behind both statutes is distinct. To this extent, the double jeopardy clause does not prohibit conviction of both rape and incest under the facts of the case at bar.

In *Blockburger,* the United States Supreme Court stressed the following as it pertains to this issue:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. 284 U. S. 299 at 304.

Two offenses are "the same" under the double jeopardy clause of the federal constitution unless each

requires proof of an additional fact that the other does not. *Brown* v. *Ohio,* 432 U. S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

In the case at bar the respondent was indicted for having violated Kentucky Revised Statute, hereinafter "KRS", 510.040(1) which specifically defines the offense of rape in the first degree as follows:

> (1) A person is guilty of rape in the first degree when:
>
> (a) He engages in sexual intercourse with another person by forcible compulsion; or
>
> (b) He engages in sexual intercourse with another person who is incapable of consent because he:
>
> (1) Is physically helpless; or
>
> (2) Is less than twelve (12) years old.

(See Appendix at 14a.)

As it pertains to this charge, the jury was instructed as follows:

> You will find the defendant guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (1a) That in this county on a date uncertain in 1981 and before the finding of the indictment herein, he engaged in sexual intercourse with Sue Ann Hamilton; and
>
> (1b) That at the time of such intercourse, Sue Ann Hamilton was under the age of 12 years.

The respondent was also charged with having violated KRS 530.020 which specifically defines the crime of incest as follows:

> (1) A person is guilty of incest when he has sexual intercourse with a person whom he knows to be an ancestor, descendant, brother or sister. The relationships referred to herein include blood relationships of either the whole or half-blood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.
>
> (See Appendix at 14a.)

As it pertains to this particular charge, the jury was instructed as follows:

> Incest — You will find the defendant guilty under this instruction if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (a) That in this county on a date uncertain in 1981, and before the finding of the indictment herein, he engaged in sexual intercourse with Sue Ann Hamilton;
>
> (b) That Sue Ann Hamilton was his daughter; and
>
> (c) That he knew she was his daughter.

From the foregoing, it is clear that the offense of incest requires proof of a different fact than does the offense of rape and that the offense of rape requires proof of a different fact than does the offense of incest. In particular, in order to prove incest not only did the

petitioner have to prove that the respondent engaged in sexual intercourse with Sue Ann Hamilton, but the petitioner also needed to prove that Sue Ann Hamilton was the respondent's daughter and that he knew she was his daughter. Moreover, unlike the incest charge, in order to prove that the respondent committed the offense of first degree rape, the petitioner not only had to prove that the respondent engaged in sexual intercourse with Sue Ann Hamilton but also had to prove that Sue Ann at the time of the sexual intercourse was under the age of 12 years. To this extent, since each offense required proof of an element not required by the other offense, the respondent was not placed in double jeopardy when the petitioner received convictions under both statutes. See *Whalen* v. *United States,* 445 U. S. 684, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980), where this Court recognized that the dispositive question was whether Congress authorized cumulative punishments for rape and for an unintentional killing committed in the course of the rape.

In Roberson, *Kentucky Criminal Law and Procedure,* 2nd edition, sec. 139 (1927), it was noted that for purposes of an evaluation under the Double Jeopardy Clause, "the rule that a single act or transaction cannot be split into separate offenses does not apply, where a single act is common to two offenses, but each contains additional elements not common to the other . . ."

KRS 505.020(1) specifically states that when a single course of conduct of a defendant may establish the commission of more than one offense, he may be prose-

cuted for each offense. KRS 505.020 prohibits a defendant however from being convicted of more than one offense when (a) one offense is included in the other or (b) inconsistent findings of fact are required to establish the commission of the offenses or (c) the offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process unless the law expressly provides that specific periods of such conduct constitute separate offenses (see Appendix 14a-15a).

It is clear that the exceptions to KRS 505.020(1), as delineated in KRS 505.020(1)(a)(b) and (c) do not apply in the case at bar. Justice Wintersheimer of the Supreme Court of Kentucky, in his dissent to the majority opinion in the case at bar, specifically noted this fact. *Hamilton* v. *Commonwealth, supra* (see Appendix 9a). In particular, incest is not a degree of the crime of rape and rape is not a degree of the crime of incest. *Burdue* v. *Commonwealth,* 144 Ky. 428, 138 S. W. 296 (1911); *Breeding* v. *Commonwealth,* 191 Ky. 128, 229 S. W. 372 (1921). Moreover in Roberson, *Kentucky Criminal Law and Procedure,* sec. 145 (1927), it was stressed that, *"a conviction or acquittal of rape does not bar a prosecution for incest, because incest is not a degree of the crime of rape"* (Emphasis added).

Applying the above to the case at bar, it is clear that the offenses of rape and incest are clearly separate offenses and that one offense is *not* a degree of the other. Moreover, each offense requires proof of an underlying fact that the other does not. To this extent,

the respondent's convictions of rape and incest in the case at bar do not violate the Double Jeopardy Clause of the United States Constitution.

Justice Aker of the Supreme Court of Kentucky, in his dissent to the majority opinion, correctly notes that, "while both rape and incest each requires proof of sexual intercourse, each requires proof of an additional fact which the other does not. The rape herein requires proof that the partner was under twelve; incest requires proof of a family relationship." *Hamilton* v. *Commonwealth, supra* (see Appendix at 6a).

Other state courts have addressed this issue and have held that double jeopardy does not apply in similar situations. In *State* v. *Martin,* Tenn. Cr. App., 634 S. W. 2d 639 (1982), a defendant was convicted of first degree sexual conduct on two counts of violating Chapter 937, House Bill Number 356, Tennessee Public Acts of 1978. Section 3(A)(1) of that Act defined first degree sexual conduct as the sexual penetration of the body of another when the victim is 12 years of age or under. Section 3(A)(3) provided that one is also guilty of this offense when a weapon is used to force or coerce the victim to engage in sexual penetration. Conduct proscribed in both subsection (A)(1) and (3) existed in the case. The incest statute, on the other hand, proscribed the marriage or the having of carnal knowledge with certain relatives, including a man's wife's daughter.

The Court in *State* v. *Martin, supra,* stressed that the sexual conduct statute and the incest statute created separate and distinct offenses. The court further

stressed that neither offense was included in the other and that either offense may be committed without committing the other. The court then noted that, "relying on the *Blockburger* test, we find that each of these offenses requires proof of different elements . . ." See also *State ex rel. Lawrence* v. *Burke,* 253 Wisc. 240, 33 N. W. 2d 242 (1948), where the court noted that, "although the testimony might show that by the same acts he (defendant) transgressed the law yet the offenses (rape and incest) are distinct and each requires a different character of proof.

It should also be pointed out that the legislative policy behind the rape statute and incest statute in Kentucky is different. As Justice Aker of the Supreme Court of Kentucky again correctly stresses in his dissent:

> . . . The rape statute seeks to deter and punish those who would have intercourse with children incapable of consent. The incest statute seeks to deter and punish those who would have intercourse with close members of their family.
>
> *Hamilton* v. *Commonwealth, supra* (Appendix at 7a).

As Justice Wintersheimer of the Supreme Court of Kentucky astutely stresses in his dissent:

> Two laws have been violated by the appellant. Two penalties should be imposed. . . .
>
> *Hamilton* v. *Commonwealth, supra* (Appendix at 8a).

In *Albernaz* v. *United States,* 450 U. S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981), the United States Supreme Court was confronted with whether the imposition of consecutive sentences for separate offenses which contained separate penalty provisions was permissible. The court in *Albernaz* held that the two statutes were directed at separate evils. The court in *Albernaz* specifically noted that the "dispositive question" was:

> whether Congress intended to authorize separate punishments for the two crimes . . . This is so because the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.
>
> *Id.,* 101 S. Ct. at 1145.

The court in *Albernaz, supra,* concluded by stressing that where Congress intended, as it did here, to impose mutliple punishments, imposition of such sentences did not violate the Constitution. See also *Missouri* v. *Hunter,* 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983).

It is abundantly clear that Kentucky's legislature intended that the crimes of rape and incest be separate and distinct and also intended that a conviction of one does *not* necessarily preclude conviction of the other where the facts are present to support a conviction for both offenses. As has been noted earlier, the policy behind Kentucky's statutes defining rape and incest is indeed distinct. This can be demonstrated from the mere fact that KRS 510.040 (Rape) is found within

Chapter 510 of the Kentucky Revised Statutes defining sexual offenses while KRS 530.020 (Incest) can be found within Chapter 530 of the Kentucky Revised Statutes defining family offenses.

One final point should be mentioned. The majority opinion of the Supreme Court of Kentucky in comparing the crimes of rape and incest, incorrectly analyzes the above two offenses when it stresses that, "Thus in a sense the additional fact was not present in 'each' case as required by *Blockburger* but in only one case." *Hamilton* v. *Commonwealth, supra* (Appendix at 3a). In particular, by using such language, this Court seems to incorrectly imply that one offense is a lesser included offense of the other offense. This position is strengthened by the fact that the majority opinion cites the United States Supreme Court case of *Harris* v. *Oklahoma,* 433 U. S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), as the case "of nearest analogy." *Hamilton* v. *Commonwealth, supra* (Appendix at 3a).

The petitioner argues that *Harris* v. *Oklahoma, supra,* is simply not applicable to the facts in the case at bar. In *Harris Id.,* this Court said "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U. S. at 682. This is simply not the situation however in the case at bar.

From the above, it is clear that the double jeopardy clause of the United States Constitution was not

violated when the respondent was convicted of both rape and incest in the case at bar. This Court should grant the petitioner's application for writ of certiorari in order to decide this important federal question.

CONCLUSION

For the foregoing reasons, the petitioner, the Commonwealth of Kentucky. respectfully requests that its petition for writ of certiorari of the Opinion of the Supreme Court of Kentucky be granted to the extent that said opinion reverses and remands the respondent's incest conviction.

Respectfully submitted,

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PROOF OF SERVICE

I, George M. Geoghegan, Jr., counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, with first class postage prepaid, to Hon. Paul F. Isaacs, Public Advocate, and Hon. Timothy Riddell, Assistant Public Advocate, Third Floor, State Office Building Annex, Frankfort, Kentucky 40601, Counsel for Respondent, and that all parties required to be served have been served, all on this January 20th, 1984.

George M. Geoghegan Jr.

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Appendix

RENDERED: AUGUST 31, 1983
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 82-SC-671-MR

VONDLE LEE HAMILTON - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Pike Circuit Court
Honorable Reed D. Anderson, Judge
No. 81-CR-132

OPINION OF THE COURT BY JUSTICE GANT— AFFIRMING IN PART; REVERSING IN PART AND REMANDING

Appellant and his wife, Pauline, were tried jointly for the crimes of rape and incest, emanating from a sexual intercourse by appellant upon their ten-year-old daughter. Appellant was found guilty and sentenced to life imprisonment for the rape, and ten years for incest, sentences to be served concurrently. Three errors are asserted on this appeal.

Appellant first contends that the introduction of evidence by the wife, during their joint trial, by which she sought to prove that she was a battered spouse and thus so frightened of her husband that she acceded to his demands, constituted evidence of other nonrelated offenses, thereby denying appellant a fair trial. This argument is without merit. There was no motion for separate trials filed herein,

pursuant to RCr 9.16; nor was there any contemporaneous objection made to the evidence as it was adduced, thus not preserving any alleged errors for our consideration. *Huff* v. *Commonwealth,* Ky., 560 S. W. 2d 544 (1977). Appellant participated in cross-examination concerning this alleged abuse, and even testified himself concerning at least one incident, thus effectively waiving any objection to that evidence. *Oney* v. *Commonwealth,* 225 Ky. 590, 9 S. W. 2d 723 (1928).

Appellant next argues prejudicial error because the clerk, in calling the docket for the day and before the jury was even called or empaneled, read loud that appellant was charged with "rape and persistent felony offender." The record contains no evidence that this occurred and, even assuming it did occur, there is no evidentiary record that it was heard or noted by the jury or that there was any influence on the verdict resulting therefrom. This argument, based upon the record before us, is also without merit.

The third error brought before us is apparently one of first impression. Appellant was convicted in this instance for *both* rape and incest resulting from a single act of sexual intercourse with his ten 10-year-old daughter. Appellant contends that to permit the jury to impose both sentences for this single act constitutes violation of his constitutional guarantee against double jeopardy. We agree.

The standard rule for determination of whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States,* 284 U. S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each pro-

> vision requires proof of a fact which the other does not. . . .

However, the *Blockburger* test is not applied in the abstract, so that we merely look at the statute standing alone. The test must be applied subjectively. When we view the present case, we find that the proof utilized to convict the appellant of rape was that he had sexual intercourse with a ten-year-old child, who was, in actuality, his daughter. The only additional fact—the relationship of farther/daughter—was required in the incest charge. Thus, in a sense, the additional fact was not present in "each" case, as required by *Blockburger,* but in only one case.

Of nearest analogy is the case of *Harris* v. *Oklahoma* 433 U. S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977). In that case, Harris, had been tried and convicted of the felony murder of a grocery clerk. The state then sought to try him for the armed robbery of the store. Armed robbery, of course, was a separate offense, and not an included offense, to a murder charge, just as incest is a separate offense and not an included offense to the charge of rape. *See Breeding* v. *Commonwealth,* 191 Ky. 128, 229 S. W. 372 (1921), and *Burdue* v. *Commonwealth,* 144 Ky. 428, 138 S. W. 296 (1911). In holding that the second prosecution was barred by the Double Jeopardy Clause, the court held that the ingredients of the lesser offense were necessary to prove the greater offense, thus constituting two trials for the same incident. The court quoted *In re Nielsen,* 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889), as follows:

> [A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

That part of the judgment finding the appellant herein guilty of the crime of rape and sentencing him to life imprisonment therefor is affirmed. That part of the judgment finding the appellant guilty of incest is reversed, and this case is remanded to the lower court with directions to set aside the incest conviction.

All concur except Aker and Wintersheimer, JJ., who dissent and file herewith separate dissenting opinions.

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Counsel for Appellee:

STEVEN L. BESHEAR
Attorney General
Capitol Building
Frankfort, KY 40601

W. BRUCE COWDEN, JR.
Assistant Attorney General

RENDERED: AUGUST 31, 1983
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 82-SC-671-MR

VONDLE LEE HAMILTON - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Pike Circuit Court
Honorable Reed D. Anderson, Judge
No. 81-CR-132

DISSENTING OPINION BY JUSTICE AKER

I must dissent from that portion of the majority opinion which reverses the appellant's conviction for incest. The majority contends that conviction for both rape and incest violates the constitutional prohibition against double jeopardy. I respectfully disagree.

As the majority correctly points out, the standard for determining this issue was stated in *Blockburger* v. *United States*, 284 U. S. 299, 304.

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . .

Where the majority opinion goes astray is in its insistence that this rule is somehow something more than a

rule of statutory construction. It is not. The majority opinion appears to suggest that conviction for both offenses is prohibited because both crimes were committed by the same act, and thus would involve substantially the same "proof" at trial.

This reasoning ignores the language of *Blockburger, supra*, upon which the majority purports to rely. The rule does not say conviction of two separate offenses for the same act is prohibited, but instead, the rule is designed to determine *when* conviction of two offenses for the same act is prohibited. Conviction of two offenses is not prohibited where "each provision requires proof of a fact which the other does not." The "facts" referred to are the elements of the statutory provisions.

In this case it is clear that "each provision requires proof of a fact which the other does not." Rape, as defined in KRS 510.040 and as applied to this case, requires proof of (1) sexual intercourse, (2) with one who is less than twelve years old. Incest, as defined in KRS 530.020, requires proof of (1) sexual intercourse, (2) with certain members of one's family (in this case the appellant's daughter). While both rape and incest each require proof of sexual intercourse, each requires proof of an additional fact which the other does not. The rape herein requires proof that the partner was under twelve; incest requires proof of a family relationship.

The majority's reliance on *Harris* v. *Oklahoma*, 437 U. S. 682, is likewise unpersuasive. Under the felony murder statute involved in that case, conviction of felony murder required proof of the underlying felony. Obviously then, the underlying felony was a "lesser-included offense" of felony murder in the sense that conviction for felony murder required proof of *every* element of the felony. Conviction for the felony did not require proof of a fact not required for conviction of felony murder.

I am of the opinion that conviction for both rape and incest under the facts of this case do not violate the constitutional prohibition against double jeopardy. The policy behind each statute is distinct. The rape statute seeks to deter and punish those who would have intercourse with children incapable of consent. The incest statute seeks to deter and punish those who would have intercourse with close members of their family. That the appellant committed both crimes by the same act is of no constitutional significance.

I would affirm the judgment of the lower court in all respects.

SUPREME COURT OF KENTUCKY

No. 82-SC-671-MR

VONDLE LEE HAMILTON - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Pike Circuit Court
Honorable Reed D. Anderson, Judge
No. 81-CR-132

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from that part of the majority opinion which reverses the conviction for incest because the conviction for both rape and incest does not constitute double jeopardy. Two laws have been violated by the appellant. Two penalties should be imposed. No prejudice results because he is to serve both sentences concurrently. A life sentence only means that he will be eligible for parole in less than eight years.

The legislature has prohibited two different crimes. Consequently, there is no logical reason why he is prejudiced by imposing two penalties.

Child abuse by means of the illegal sexual conduct of incest is not a lesser-included offense of the crime of rape. There are two separate laws which have been violated. The majority decision severely limits prosecutors in charging those who abuse female children. It creates a new technical defense and gives an unneeded advantage to those

who break the law. The trial court did not err and did not violate the appellant's constitutional guarantee against double jeopardy as well as his right to be free of multiple prosecutions by permitting a conviction of incest as well as rape.

The crime of incest denounced by KRS 510.040 requires proof of a different fact than does the offense of rape, and rape requires different proof from incest. A conviction for incest requires a showing of sexual contact within a proscribed degree of blood relationship, and there is no requirement that forcible compulsion be shown. On the other hand, blood relationship is irrelevant for a rape conviction but forcible compulsion is a required element. Incest is not a degree of the crime of rape, and rape is not a degree of the crime of incest.

The majority totally misinterprets the case of *Blockburger* v. *United States*, 284 U. S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Two offenses are the same under the double jeopardy clause of the Federal Constitution, unless each requires proof of an additional fact that the other does not. *Brown* v. *Ohio*, 432 U. S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). Here the offenses of rape and incest are clearly separate and one is not a lesser-included offense of the other. Each offense requires proof of a fact that the other does not. The appellant's conviction of rape and incest did not violate the double jeopardy prohibition. The majority opinion is a significant departure from existing case law.

The majority opinion ignores the legislative mandate of KRS 505.020, which states that where a single course of criminal conduct establishes the commission of more than one offense, the accused may be prosecuted for each offense. The exceptions as set out in KRS 505.020(1)(a), (b) and (c) do not apply here. The citations of authority and their interpretation by the majority are not persuasive.

The criminal conduct of the appellant compounded the convictions. He cannot legitimately claim the protection of constitutional double jeopardy. There is no manifest injustice or constitutional infirmity in the conviction for both incest and rape.

I would affirm the conviction in all respects.

SUPREME COURT OF KENTUCKY

82-SC-671-MR

VONDLE LEE HAMILTON - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Pike Circuit Court
Honorable Reed D. Anderson, Judge
No. 81-CR-143

ORDER DENYING PETITION FOR REHEARING

The appellee's petition for rehearing is denied.

Stephens, C. J., and Aker, Gant, Leibson, Stephenson and Vance, JJ., concur; Wintersheimer, J., not concurring.

Entered November 23, 1983.

(s) Robert F. Stephens
Chief Justice

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indicement of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at

any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and cititzens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

KENTUCKY PENAL CODE

510.040. Rape in the first degree.—(1) A person is guilty of rape in the first degree when:

(a) He engages in sexual intercourse with another person by forcible compulsion; or

(b) He engages in sexual intercourse with another person who in incapable of consent because he:

1. Is physically helpless; or

2. Is less then twelve (12) years old.

(2) Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony. (Enact. Acts 1974, ch. 406, § 84.)

530.020. Incest.—(1) A person is guilty of incest when he has sexual intercourse with a person whom he knows to be an ancestor, descendant, brother or sister. The relationships referred to herein include blood relationships of either the whole or halfblood without regard to legitimacy, relationship of parent and child by adoption, and relationship of stepparent and stepchild.

(2) Incest is a Class C felony. (Enact. Acts 1974, ch. 406, § 258.)

505.020. Prosecution for multiple offenses.—(1) When a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense when:

(a) One offense is included in the other, as defined in subsection (2); or

(b) Inconsistent findings of fact are required to establish the commission of the offenses; or

(c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

(2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It consists of an attempt to commit the offense or to commit an offense otherwise included therein; or

(c) It differs from the offense charged in the respect that a lesser kind of culpability suffices to establish its commission; or

(d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission. (Enact. Acts 1974, ch. 406, § 44.)

NO. 83-1212

FEB 24 1984
ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

October 1983 Term

COMMONWEALTH OF KENTUCKY — PETITIONER

FEB 24 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

VS.

VONDLE LEE HAMILTON — RESPONDENT

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES
DEPARTMENT OF PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

TABLE OF AUTHORITIES

CASES	PAGE
Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)	4
Berning v. Commonwealth, Ky., 550 S.W.2d 561 (1977)	4
Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)	3, 4
Brown v. Ohio, 431 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)	3
Gooding v. Wilson, 495 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972)	3
Gurley v. Rhoden, 421 U.S. 200, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975)	3
Hamilton v. Commonwealth, Ky., 659 S.W.2d 201 (1983)	4
Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980)	3
Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978)	3
O'Brien v. Skinner, 414 U.S. 524, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974)	3

NO. 83-1212

SUPREME COURT OF THE UNITED STATES

October 1983 Term

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

VONDLE LEE HAMILTON — RESPONDENT

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

WHETHER THIS COURT MUST ACCEPT THE SUPREME COURT OF KENTUCKY'S IDENTIFICATION OF ELEMENTS OF THE OFFENSES OF RAPE AND INCEST?

STATEMENT OF THE CASE

Respondent accepts, for the most part, Appellee's recitation of the facts. However, it is important to point out a mistatement of facts made by Petitioner as well as a very telling omission.

Petitioner contends that the prosecutrix in this case denied that anyone else had had sexual intercourse with her (Brief for Petitioner 4). However, the prosecutrix admitted at the trial below that she had had intercourse on numerous occasions with her brothers (TE 139, 143, 144). For that matter, the prosecutrix's fifteen year old brother, Randy, candidly admitted that he had engaged in sexual intercourse with Sue Ann ever since he was eleven years old (TE 222, 223). This testimony was significant to Appellant's defense since it demonstrated why the treating doctor could conclude that the prosecutrix had engaged in sexual intercourse numerous times over some period of time (TE 120, 122) even though Respondent denied any misconduct.

The major and significant omission from Petitioner's Statement of the Case pertains to exactly what sentence was imposed upon Respondent as a result of him being found guilty both of the rape and the incest of the prosecutrix. As correctly indicated by Petitioner, Respondent was found guilty of rape in the first degree and his punishment was fixed at life by the jury. At the same time, he was also found guilty of incest and his sentence was fixed at ten years in the penitentiary. However, when the judge pronounced sentence against Respondent, it ordered the ten year sentence for incest to run concurrently with the life sentence (TR 119-121; App. 1-3). Since Respondent's conviction for rape in the first degree was upheld by the Supreme Court of Kentucky, he is presently serving the only sentence he ever received -- life.

SUMMARY OF THE ARGUMENT

This Court should deny this Petition for Writ of Certiorari in light of the fact that the Supreme Court of Kentucky's identification of the elements of the offenses of rape and incest establishes that indeed Respondent's conviction for both arising from the same incident cannot withstand constitutional scrutiny.

Secondly, this Court should deny the Petition for Writ of Certiorari because the sentence imposed on Respondent for the incest conviction was ordered to run concurrently with the sentence imposed for the rape conviction. Thus, the need to review the incest count cannot possibly be a pressing one since, regardless of the outcome of this case, Respondent will remain in jail for the same length of time.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI SINCE THE SUPREME COURT OF KENTUCKY HAS THE FINAL AUTHORITY TO INTERPRET ITS OWN STATE'S LEGISLATION AND SINCE THE RESOLUTION OF THE ISSUE PRESENTED WOULD HAVE NO IMPACT ON RESPONDENT'S CASE AND MINIMAL RAMIFICATIONS ON THE ADMINISTRATION OF JUSTICE.

In essence, what Petitioner is arguing in this case is that the Supreme Court of Kentucky has misinterpreted its own statute. It now wishes this Court to second guess the Kentucky Supreme Court's ruling on those statutes and to construe them in such a way as to allow there to be convictions under both without violating the Double Jeopardy Clause.

Petitioner correctly points out that the Kentucky Supreme Court has ruled in this case that rape and incest are elementally the same crime except incest requires the proof of an additional element. Petitioner would undoubtedly agree that if indeed that were a binding interpretation of the statute, then a conviction for both crimes arising from the same incident would be constitutionally prohibited since only one of the crimes (incest) would require proof of an additional fact that the other would not. See Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Petitioner, however, contends that the Kentucky Supreme Court's ruling is erroneous in regard to how the statutes should be interpreted. It wishes this Court to second guess the Kentucky Supreme Court in terms of construing the Kentucky statutes and then apply the Blockburger test to its own construction of the Kentucky statute. However, as this Court is aware, it lacks "jurisdiction authoritatively to construe state legislation" Gooding v. Wilson, 405 U.S. 518, 520, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). Stated otherwise, it is not this Court's "function to construe a state statute contrary to the construction given it by the highest court of a State". O'Brien v. Skinner, 414 U.S. 524, 531, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974).

Since "a State's highest court is the final judicial arbiter of the meaning of state statutes" (Gurley v. Rhoden, 421 U S. 200, 208, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975)), this Court is bound by the state court's interpretation of such statutes even though it may interpret those statutes differently if it were the highest court of the state. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837, fn. 9, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978).

Of course, in cases where double jeopardy violations are claimed, this Court "must" accept the states highest court's "identification of the elements of the offenses". Illinois v. Vitale, 447 U.S. 410, 416, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). See also Brown v. Ohio, 431 U.S. 161, 167, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

In this case of first impression, the Kentucky Supreme Court has identified the elements of the offenses of rape and incest in such a way as to have them be the same except for incest which requires the proof of one additional fact. Thus, with the crimes defined as such, it is clear that the Kentucky Supreme Court's application of double jeopardy principles found in

Blockburger is valid. This standing alone should be sufficient reason for this Court not to grant certiorari.

Not only should this Court deny certiorari in light of the Kentucky Supreme Court's identification of the elements of the crimes of rape and incest, it also should deny certiorari because this case is, in essence, much ado about nothing.

The sentence imposed against Petitioner by the trial court was a life sentence for the rape charge. The ten year incest sentence was ordered to run concurrently with that life sentence. The sentence appealed was a life sentence and the sentence that Petitioner is still serving is a life sentence notwithstanding the fact that the incest conviction has been reversed. No decision by this Court either for or against Respondent will change in any way the sentence which he is to serve. See Berning v. Commonwealth, Ky., 550 S.W.2d 561, 563-564 (1977) which stands for the principle that in a non-dealth penalty case in Kentucky, all sentences imposed with a life sentence run concurrently.

In this context, the need for review of Petitioner's contention cannot possibly be deemed a pressing one. As Justice White so cogently observed in his concurrence in Benton v. Maryland, 395 U.S. 784, 799, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969):

> Where a man has been convicted on several counts and sentenced concurrently upon each, and where judicial review of one count sustains its validity, the need for review of the other counts is not a pressing one since, regardless of the outcome, the prisoner will remain in jail for the same length of time under the count upheld. Rather than permit other cases to languish while careful review of these redundent counts is carried to its futile conclusion, judicial resources might be better employed by moving on to more pressing business.

Not only will a resolution of this issue not have any impact on Respondent, it will have minimal, if any, impact on the criminal justice system. Both the crimes of rape and incest have been extant in Kentucky in their present form since January 1, 1975. But as the Supreme Court of Kentucky acknowledged in its published opinion, the issue facing it was "one of first impression". Hamilton v. Commonwealth, Ky., 659 S.W.2d 201, 202 (1983). The fact that such an issue arises once every nine years clearly demonstrates that it is not an issue which is burning to be resolved in order to ensure the proper administration of criminal justice in the land.

This point has apparently been implicitly admitted by Petitioner since it does not in any way argue that there are any compelling reasons why this issue must be resolved. It just simply argues that the Kentucky Supreme Court has erred in interpreting its own statutes. Furthermore, Petitioner does not even contend that Respondent has benefited in any way from the decision nor that he will be in any way affected by it. Clearly this is much ado about nothing.

CONCLUSION

For the foregoing reasons, Respondent respectfully moves this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

APPENDIX

PIKE CIRCUIT COURT
Division I

Action No. 81-CR-132

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs: FINAL JUDGMENT
SENTENCE OF IMPRISONMENT

VONDIA LEE HAMILTON a/k/a
VONDLE LEE HAMILTON DEFENDANT

* * *

The defendant having entered a plea of not guilty and on the 18th day of February, 1982, a jury having returned verdicts that the defendant was guilty of Count I, First-Degree Rape, and fixed his sentence at a term of life imprisonment in the state penitentiary, and guilty of Count II, Incest, and fixed his sentence at ten (10) years confinement in the state penitentiary.

On the 19th day of February, 1982, the defendant, Vondia Lee Hamilton, also known as Vondle Lee Hamilton, appeared in open Court with this attorney, Hon. Thomas W. Goodman, Jr. The defendant and his counsel waived the presentence investigation report and requested to be sentenced immediately. A signed Waiver is filed as part of the record herein.

The Court inquired of the defendant and his counsel whether they had any legal cause why judgment should not be pronounced and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment.

Having given due consideration to the nature and circumstances of the crimes, and the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary because probation would unduly depreciate the seriousness of the defendant's crimes. No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant.

It is, therefore, ORDERED AND ADJUDGED that the defendant is guilty of the crime of first-degree rape and that he shall be confined in the state penitentiary for a term of life; and

It is further ORDERED AND ADJUDGED that the defendant is guilty of the crime of incest and that he shall be confined in the state penitentiary for a term of ten (10) years, said sentence to run concurrently with the life term.

It is further ORDERED AND ADJUDGED that the Pike County Sheriff shall deliver the defendant to the custody of the Department of Corrections hereunder at such location within

the state as the Department shall designate.

It is further ORDERED AND ADJUDGED that the defendant is hereby credited with the time spent in custody prior to the commencement of sentence, namely 39 days, toward service of the maximum term of imprisonment.

After imposing sentence, the Court informed the defendant that he had a right to appeal to the Supreme Court of Kentucky with the assistance of counsel; that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him; that an appeal must be taken within ten (10) days of the date of this judgment and that the Clerk of the Court would prepare and file a notice of appeal in his behalf within that time if he so requests. Bail on appeal is disallowed by Statute and the defendant is remanded to the custody of the Pike County Jailer until he can be transported to a state facility.

ENTERED this 22nd day of February, 1982.

Reed S. Alder
JUDGE

No. 83-1212

SUPREME COURT OF THE UNITED STATES

October 1983 Term

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

VONDLE LEE HAMILTON — RESPONDENT

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Vondle Lee Hamilton, who is now being held in a Kentucky penal institution, asks leave of this Court, pursuant to Rule 46, to file the attached Brief in Opposition for Respondent in forma pauperis and without prepayment of costs.

The Respondent was allowed to proceed in forma pauperis on his direct appeal to the Supreme Court of Kentucky.

Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
(502) 564-5212

COUNSEL FOR RESPONDENT

NO. 83-1212

SUPREME COURT OF THE UNITED STATES

October 1983 Term

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

VONDLE LEE HAMILTON — RESPONDENT

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Vondle Lee Hamilton, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this action are true.

1. Are you presently employed? YES_____ NO X

   a. If the answer is yes, state the amount of your salary per month and give the name and address of your employer.

   _____

   b. If the answer is no, state the date of last employment and the amount of the salary per month which you received.

   February 1982 Kentucky Coal Company - [illegible]

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ( ) No (X)
   b. Rent payments, interest, or dividends? Yes ( ) No (X)
   c. Pensions, annuities, or life insurance payments? Yes ( ) No (X)
   d. Gifts or inheritances? Yes ( ) No (X)

e. Any other sources: Yes (✓) No ( )

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

Federal Tax Refund $2,552 income in 1983 approx $[illegible] [illegible] for living expenses

3. Do you own any cash or do you have money in a checking or savings account: Yes (✗) No ( ) (Include any funds in prison accounts).

If answer is yes, state the total value owned.

$45.51 prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ( ) No (✗)

If answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. [illegible]

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury.

[illegible]
Vondle Lee Hamilton

I declare under penalty of perjury that the foregoing is true and correct. Signed this 7th day of February, 1984.

[illegible]
Vondle Lee Hamilton

Sworn and subscribed to before me by Vondle Lee Hamilton on this _____ day of February, 1984.

NOTARY PUBLIC - STATE AT LARGE

My Commission Expires: _____

CERTIFICATION OF AMOUNT OF FUNDS
IN PRISONERS' INSTITUTIONAL ACCOUNT

I, Jennifer Morrison, of Northpoint Training Center do hereby certify that Vondle Lee Hamilton, according to the records in the Office of the Chief Clerk has the sum of $ 45.57 in his personal account as of this 21st day of February, 1984.

Jennifer Morrison
CERTIFYING OFFICER

Custodian, Inmate Accts.
TITLE
2-21-84

NO. 83-1212

SUPREME COURT OF THE UNITED STATES

October 1983 Term

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

VONDLE LEE HAMILTON — RESPONDENT

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

CERTIFICATE OF SERVICE

I, Timothy T. Riddell, counsel for respondent, hereby certify that the attached Brief For Respondent in Opposition, Appearance Form, Motion for Leave To Proceed In Forma Pauperis and Affidavit of Indigency were mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and to counsel for respondent, Hon. David L. Armstrong, Attorney General, Commonwea'th of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 22nd day of February, 1984, by depositing same in a United States mail box, first class postage prepaid.

Timothy T. Riddell

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR RESPONDENT

Duly witnessed and sworn to
before me, a Notary Public,
this 22nd day of February,
1984.

Brenda G. Hughes
Notary Public
State at Large

My Commission Expires: August 3, 1985

SUPREME COURT OF THE UNITED STATES

October 1983 Term

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

VONDLE LEE HAMILTON — RESPONDENT

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 28.2

I, Timothy T. Riddell, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel for Respondent in the above-styled action.

3. The attached Brief For Respondent In Opposition, Appearance Form, Motion for Leave to Proceed In Forma Pauperis, Affidavit of Indigency, and Certificate of Service were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. Alexander L. Stevas, Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543.

5. To my knowledge, the mailing of the aforementioned documents took place on February 22, 1984 which is within 30 days of the January 23, 1984 docketing in this Court of Petitioner's Petition For Writ of Certiorari.

Timothy T. Riddell

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR RESPONDENT

Duly witnessed and sworn to
before me, a Notary Public,
this 22nd day of February,
1984.

Brenda G. Hughes
Notary Public
State at Large

My Commission Expires: August 3, 1985